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Enforcing the International Convention for the Regulation of Whaling: The Pelly and Packwood-Magnuson Amendments

GENE S. MARTIN, JR. AND JAMES W. BRENNAN*

I. INTRODUCTION

In its preamble, the International Convention for the Regulation of Whaling¹ (ICRW) states that it desires "to establish a system of international regulation for the whale fisheries to ensure proper and effective conservation and development of whale stocks."² To help achieve this objective the ICRW included a Schedule with specific regulations relating to the conservation and utilization of whale resources. The ICRW also created the International Whaling Commission (IWC)³ and empowered it to amend the Schedule by adopting regulations for the conservation and utilization of whale resources.⁴ In exercising this authority, the IWC may, among other things, identify protected species, establish whaling seasons, open and closed water areas, set size limits, whaling methods and catch quotas.⁵

None of these regulations are necessarily binding on any nation, however, under the ICRW or as a matter of international law. Article V of the ICRW allows each member to register an objection to any regulation amending the Schedule. Once an objection to a regulation has been duly filed with the IWC, the regulation is not effective as to the objecting member. Although all non-objecting members remain bound by a regulation, there are no sanctioning or enforcement powers provided by the ICRW.

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1. Dec. 2, 1946, 62 Stat. 1716, T.I.A.S. No. 1849, 161 U.N.T.S. 361 (*entered into force* Nov. 10, 1948). The International Convention for the Regulation of Whaling [hereinafter ICRW] is implemented in U.S. law in Whaling Convention Act, 16 U.S.C. § 951 (1985).

2. *Id.* at Preamble.

3. ICRW, Art. III.

4. ICRW, Art V. Art III of the ICRW requires a three-fourths majority vote for any action taken pursuant to Art. V. All other decisions of the IWC require only a simple majority.

5. *Id.*

The United States, on the other hand, has two laws that give authority to the executive branch to sanction any nation that may violate the policies and objectives of the ICRW's conservation program - the Pelly Amendment⁶ (hereinafter referred to only as the "Pelly Amendment") to the Fishermen's Protective Act⁷ passed in 1971 and the Packwood-Magnuson Amendment⁸ (hereinafter referred to only as the "Packwood-Magnuson Amendment") to the Magnuson Fishery Conservation and Management Act⁹ (Magnuson Act) passed in 1979.

This article discusses the origins, provisions and interpretations of the Pelly Amendment and the Packwood-Magnuson Amendment and their applicability to the ICRW conservation program for whales. It also reviews the certifications and sanctions that have occurred regarding whaling by other nations with emphasis on recent decisions concerning research whaling of Japan, Norway, Republic of Korea and Iceland.

II. PELLY AND PACKWOOD-MAGNUSON AMENDMENTS

The primary tools available to the United States government to encourage other countries to comply with ICRW conservation policies and objectives are the Pelly Amendment and the Packwood-Magnuson Amendment. These amendments establish a process known as certification which occurs when the Secretary of Commerce determines that nationals of a country are engaged in whaling operations which diminish the effectiveness of the ICRW. Once a country has been certified under this process, certain sanctions are possible. Under the Pelly Amendment the sanctions reside solely within the discretion of the President, whereas under Packwood-Magnuson, sanctions are required to be imposed by the Secretary of State. The provisions of both amendments and their origins are discussed below. A description of the application of these amendments to particular situations is discussed in subsequent sections.

A. *Origins and Provisions of the Pelly Amendment*

In 1969, the International Commission for the Northwest Atlantic Fisheries¹⁰ (ICNAF) banned Atlantic high seas salmon fishing because of a growing threat to that population of fish. Three members of ICNAF, Denmark, Norway and the Federal Republic of Germany objected to the ban and under the terms of ICNAF were free to ignore the terms of the ban without breaching the terms of the ICNAF. Denmark's failure to

6. 22 U.S.C. § 1978 (Supp. 1988) (codified as amended at P.L. No. 100-711 (Nov. 23, 1988)).

7. 22 U.S.C. § 1971 (1979 & Supp. 1988).

8. 16 U.S.C. § 1821(e)(2)(1985).

9. 16 U.S.C. § 1801 (1985 & Supp. 1988)

10. ICNAF was composed of 15 nations at the time, including the United States, bordering the North Atlantic Ocean or actively engaged in fishing in those waters. Its purpose was to conserve fishing resources in the Northwest Atlantic at level which would permit the maximum sustained catch. The ICNAF is no longer in existence.

comply with the ban, particularly, effectively nullified any benefits that would come from the ban.

To address this situation, Congressman Pelly of Washington introduced a bill¹¹ to amend the Fishermen's Protective Act intended primarily to protect North Atlantic salmon from depletion by Danish fishermen. After hearings, the bill was expanded to include the protection of all species of fish, including whales, and any international fishery conservation program. The bill, which became known as the Pelly Amendment, was signed into law on December 23, 1971.¹² Ironically, neither the statutory language or House and Senate Committee Reports mentions whaling or the ICRW which has become the main focus of Pelly Amendment considerations.

The Pelly Amendment states that when the Secretary of Commerce determines nationals of a foreign country, directly or indirectly, are conducting fishing operations in a manner or under circumstances which diminish the effectiveness of an international fishery conservation program, the Secretary shall certify¹³ such determination to the President of the United States.¹⁴

Upon receipt of such certification, the President may direct the Secretary of Treasury to prohibit the importation into the United States of fish products¹⁵ of the offending country for such duration as he determines appropriate and to the extent that such prohibition is sanctioned by the General Agreement on Tariffs and Trade (GATT).¹⁶ Within 60

11. H.R. 3304, 92nd Cong., 1st Sess. (1971)

12. Pub. L. 92-219, 85 Stat. 786 (1971).

13. This is done by letter from the Secretary of Commerce to the President.

14. 22 U.S.C. §1978(a)(1) (1979).

15. "Fish Products" was originally defined in the Pelly Amendment to mean "fish and marine mammals and all products thereof taken by fishing, vessels of an offending country whether or not packed, processed or within the jurisdiction thereof." 22 U.S.C. §1978(h)(4) (Supp. 1988) (as amended at Pub. L. 100-78 (Nov. 23, 1988)), and now reads: "any aquatic species (including marine mammals and plants) and all products thereof exported from an offending country, or packed, processed, or otherwise prepared for export in such country or within the jurisdiction thereof." The purpose of this change was to expand the President's options in deciding which products to embargo. In the original definition the President was restricted to embargoing fish and products thereof that were taken by vessels of the offending nation. To determine what products coming into the United States were taken by the offending nation was seen by Congress to be a difficult or impossible task that would make it less likely that the President could decide upon a workable embargo to impose against an offending country. Accordingly, Congress struck the restriction regarding fish products taken by the vessels of an offending country and substituted the present language allowing any fish product coming from the offending country.

16. 22 U.S.C. §1978(a)(4) (1971). Article XX of GATT provides for imposition of trade measures against member nations if it justifiably relates to the conservation of exhaustible natural resources. The House Report accompanying the original Pelly Amendment states that Article XX does not limit the President to declaring an embargo on only the kind of fish product that is being caught in violation of an international fishery conservation program. H.R. Rep. No. 92-468, 92nd Cong. 1st Sess. 6, *reprinted in* 1971 U.S. CODE CONG. & ADMIN. NEWS 2414. Whether this is an appropriate interpretation has never been directly

days following certification, the President is required to notify the Congress¹⁷ of any action taken by him pursuant to such certification.¹⁸ In the event the President fails to direct the Secretary of the Treasury to prohibit the importation of fish products of the offending country, or if such prohibition does not cover all fish products of the offending country, the President is required to inform the Congress of the reasons of such course of action.¹⁹

In 1978, the Pelly Amendment was amended²⁰ by the addition of 22 U.S.C. § 1978(a)(2) which expands the scope of its provisions to situations where the Secretary of Commerce or the Secretary of Interior finds that nationals of a foreign country are engaging in "trade or taking" of "wild-life products" which diminishes the effectiveness of any international conservation program²¹ for endangered or threatened species. Once a country is certified under this provision, the President is given the same discretion to impose sanctions as he has under the original Pelly Amendment Provision²² except that the products that can be embargoed include any kind of "wildlife product."²³ This expanded provision could be used against a member nation of IWC, for example, if the Secretary of Commerce determined that the nation was engaged in the trade of whale meat which violated the ICRW. Under the original provision of the Pelly Amendment, the mere trading of whale meat would not necessarily trigger the Pelly Amendment because it arguably would not involve "fishing operations."

The Pelly Amendment was again amended in 1979 with the additions of 22 U.S.C. § 1978(a)(3) and (d).²⁴ Section (a)(3) requires the Secretaries of Commerce and Interior to monitor, investigate and act upon any activities of a foreign nation that may be a cause for a certification and promptly conclude whether certification is necessary. Section (d) provides for the termination of certification if the reasons for the certification no longer prevail.

The Pelly Amendment was most recently amended on November 23, 1988 by Pub. L. 100-711 which expands the definition of "fish product[s]"

tested.

17. This is done by an open letter to the congress from the President.

18. 22 U.S.C. §1978(b)(1979).

19. *Id.*

20. Pub. L. 95-376, §2, 92 Stat. 714 (Sept. 18, 1978).

21. Legislative history indicates that the major international conservation agreement contemplated by the amendment is the Convention of International Trade in Endangered Species of Wild Fauna and Flora, *opened for signature* March 3, 1973, 27 U.S.T. 1087, T.I.A.S. No. 8249.

22. 22 U.S.C. §1978 (a)(1) (Supp. 1988).

23. "Wildlife product" is defined in 22 U.S.C. §1978(h)(6) as "fish and wild animals, and parts (including eggs) taken within a offending country and all products of any such fish and wild animals"

24. Pub. L. 96-61, §3(b), 93 Stat. 408 (1979). This amendment was actually part of the Packwood-Magnuson Amendment to the Magnuson Act.

that can be subject to trade prohibitions.

B. Origins and Provisions of the Packwood-Magnuson Amendment

By 1979, almost eight years after the passage of the Pelly Amendment, the President had never imposed any trade sanctions on nations that were found to have diminished the effectiveness of the ICRW. Some members of Congress felt that the sanctions process was so protracted and discretionary as to be inadequate to ensure prompt reaction from the United States for unacceptable whaling activities by other nations.²⁵ Accordingly, Senator Packwood successfully proposed an amendment to the Magnuson Act co-sponsored by Senator Magnuson aimed solely at the ICRW which required automatic sanctions against certified foreign nations which had fishing allocations granted under the Magnuson Act.²⁶ By requiring an automatic sanction, the supporters of this legislation felt that the United States could more effectively and swiftly encourage whaling nations to comply with ICRW objectives.

Under the Packwood-Magnuson Amendment, certification is defined to mean a finding by the Secretary of Commerce that nationals of a foreign country, directly or indirectly, are conducting fishing operations or engaging in trade or taking which diminishes the effectiveness of the ICRW.²⁷ A certification under the Packwood-Magnuson Amendment shall also be deemed a certification under the Pelly Amendment.²⁸

If such a certification is issued by the Secretary of Commerce, then the actual or proposed allocation²⁹ of fishing privileges in U.S. waters under the Magnuson Act to the offending nation shall be reduced by the Secretary of State, in consultation with the Secretary of Commerce, by not less than 50 per cent.³⁰ If the condition that certification was designed to remedy remains uncorrected after 365 days, no further allocations may be made to the offending nation and those that are in effect (after the 50 per cent or more reduction) shall be rescinded.³¹ The Amendment provides for restoration of rights to receive allocations of fishing privileges only after termination of certification.³²

25. See 125 Cong. Rec. 22083-22084 (Aug. 2, 1979) (statements of Reps. Murphy and Oberstar).

26. Pub. L. 96-61, §3(a), 93 Stat. 407 (Aug. 15, 1979). The Packwood-Magnuson Amendment also amended the Pelly Amendment by adding section (a)(3) and section (d). See *supra* note 24, and accompanying text.

27. 16 U.S.C. § 1821(e)(2)(A)(i) (1985).

28. *Id.*

29. Allocations to foreign fishing fleets to fish in what is now the U.S. Exclusive Economic Zone is possible only if the foreign nation has entered into a "[G]overning international fishery agreement" (GIFA). If the offending nation has not yet received an allocation but would receive one, except for certification within the next 365 days, then that allocation is also subject to reduction. 16 U.S.C. §1821(e)(2)(B) (1985).

30. *Id.*

31. 16 U.S.C. §1821(e)(2)(D) (1985).

32. 16 U.S.C. §1821(e)(2)(C)(iii) (1985).

III. HISTORY OF CERTIFICATION DECISIONS

Since the Pelly Amendment was passed into law the United States has certified foreign countries nine times for diminishing the effectiveness of the ICRW. Of these nine certifications, two were also certifications under the Packwood-Magnuson Amendment. In addition to actually certifying a country, the United States has threatened or considered certification several more times. No Pelly Amendment sanctions have ever been imposed; Packwood-Magnuson sanctions were imposed as required by law for the two certifications occurring under that law. These certifications and threatened certifications can be divided into two time periods: pre-1982 and 1982 to the present. This discussion briefly reviews pre-1982 decisions and then discusses more completely decisions since 1982.

A. *Brief Review of Certification Decisions - 1971-1982*

Almost every situation in which the United States considered certifying a country under the Pelly Amendment has involved international whaling matters. The exception occurred immediately after the notable passage of the Pelly Amendment when the United States threatened Denmark, Norway and the Federal Republic of Germany with the application of the Amendment in order to secure an agreement on their part to end Atlantic high seas salmon fishing in 1976.

Between the years 1971 and 1982, most considerations concerning certification involved the actions or intentions of whaling nations not to comply with various quotas on the numbers of whales to be taken and the types of methods used. Although the anti-whaling sentiment of the environmentalists was gaining momentum during this period, certification decisions did not attract the intense scrutiny of the environmental community that exists now.

In 1974, Japan and the U.S.S.R. became the first countries certified under the Pelly Amendment. At its 1973 IWC meeting, the IWC adopted a quota of 5,000 Southern Hemisphere minke whales for the 1973/74 pelagic and 1974 coastal whaling seasons.³³ As allowed under the ICRW, Japan and the U.S.S.R. filed objections to the quota.³⁴ Subsequently, Soviet nationals took 4,000 minke whales and the Japanese took 3,713, thereby in combination exceeding the total quota established by the IWC. In the absence of any firm assurance that Japan and the USSR would not continue to exceed the IWC quota, the Secretary of Commerce certified both countries in November 12, 1974.³⁵ The President decided not to impose sanctions because by the time the President had reported to Con-

33. Report, 25th Report of the Int'l Whaling Comm'n Rep., at 7 (1974) [hereinafter IWC 25:7].

34. *Id.*

35. Letter from Secretary of Commerce Frederick Dent to President Gerald Ford (Nov. 12, 1974).

gress both countries agreed to strengthened conservation measures.³⁶

The next Pelly Amendment certification occurred on December 14, 1978, against Chile, Peru and the Republic of Korea.³⁷ Chilean and Peruvian whalers had been taking whales in excess of IWC whaling quotas since at least the 1975/76 pelagic whaling season and Korean whalers had exceeded IWC quotas since the 1976 coastal whaling season. During this time, none of these countries belonged to the IWC. Early in 1978, the U.S. government contacted the governments of these three nations and informed them of possible Pelly Amendment actions against them. Subsequently, all three nations began steps to join the IWC. The Secretary of Commerce, nevertheless, certified the three nations, concluding that they had been conducting whaling operations in a manner and under circumstances that diminished the effectiveness of the IWC. The President, in his required report to Congress, refrained from imposing sanctions because all three nations had either joined or taken steps to join the IWC, thereby subjecting the future activities of their nationals to the IWC conservation program.

Between 1978 and 1982, no other nation was certified, but several were threatened with certification under the Pelly Amendment and for the first time the Packwood-Magnuson Amendment if their nationals did not comply with the ICRW. In 1979, the IWC established for the first time a quota for the Spain-Portugal-British Isles population of fin whales in the North Atlantic.³⁸ Spain, a new member of the IWC, objected to this quota on behalf of its nationals who historically exceeded the quota.³⁹ In 1980, during bilateral consultations with Spain, the United States advised Spain of the potential applicability of the Pelly Amendment and the newly passed Packwood-Magnuson Amendment if Spanish nationals failed to comply with IWC quotas. At that time Spanish nationals had received fishing allocations under the Magnuson Act which were subject to the automatic Packwood-Magnuson sanction. Spanish whalers subsequently complied with the IWC quota.

In 1980, Korea objected⁴⁰ to an IWC resolution banning the use of the cold harpoon.⁴¹ After consultations between the United States and Korea in which the applicability of the Pelly and Packwood-Magnuson Amendments were discussed, Korea withdrew its objection and apparently abided by the resolution. During this same time period, the United States advised Taiwan, a non-member of the IWC, of the applicability of

36. Report from President Gerald Ford to Congress (Jan. 16, 1975).

37. Letter from Secretary of Commerce Juanita Kreps to President Jimmy Carter (Dec. 14, 1977).

38. Int'l Whaling Comm'n Rep. (1979-80); Int'l Whaling Comm'n Rep. 31:6 (1981).

39. *Id.*

40. Int'l Whaling Comm'n Rep., 1980-81, Int'l Whaling Comm'n, 32nd Mtg., para. 5 (1982).

41. The cold harpoon is one without an explosive charge in the harpoon head. The use of the cold harpoon minimizes damage to the whale meat but is considered to be inhumane.

the both amendments after verifying that Taiwan nationals in the late 1970's had taken whales in excess of IWC quotas and using methods banned by the IWC. Shortly thereafter, Taiwan restricted its whaling vessels to their home port and in July, 1981 banned whaling.⁴²

B. *Certification Decisions - 1982 to Present*

Since 1982, virtually every certification decision has been related to the moratorium on commercial whaling beginning in the 1985/86 whaling season, or to scientific research whaling conducted by nations that opposed the moratorium. To understand the context of certification decisions during this period some background is necessary.

During the 1970's and early 1980's, the IWC was becoming increasingly sensitive to environmental concerns about the status of the world's whale populations.⁴³ This concern culminated in 1982 when the IWC established a moratorium on all commercial whaling to take effect in the 1985/86 whaling season and continue at least through 1990.⁴⁴ The IWC agreed to undertake a comprehensive assessment of the effects of the decision to establish a moratorium on commercial whaling by 1990.⁴⁵

The 1982 moratorium decision was opposed by several of the major whaling nations still operating at the time including U.S.S.R., Japan and Norway. All of these nations filed timely objections to the moratorium and were therefore not bound by it under the terms of the ICRW.⁴⁶

During the time period, several nations with a history of whaling began considering fairly extensive scientific research programs calling for the lethal take of whales. Under Article VIII of the ICRW, the killing, taking and treating of whales for scientific purposes is expressly exempt from the operation of the ICRW, including quotas and the moratorium on commercial whaling. Nations are free to determine the number of whales to be taken as well as any other conditions or restrictions deemed necessary by the nation for the research. Paragraph 30 of the IWC Schedule, however, does require each nation to submit proposed scientific research permits to the IWC in time to allow the IWC's Scientific Committee⁴⁷ to review and comment on the permits.⁴⁸

42. The banning of whaling by Taiwan came after discussions with the U.S. and Japan concerning the sale of whale meat by Taiwan to Japan. Japan had been a major purchaser of whale meat caught by Taiwan whaling vessels. At one point the IWC was considering asking its members to not buy any whale meat from Taiwan to encourage it to refrain from its whaling practices in violation of the IWC conservation program.

43. This change of emphasis mirrored the rising tide of concern for all aspects of the environment in the United States and worldwide. Whales became a touchstone for the environmental movement and, as a result, IWC member countries were the targets of increasing political pressure from environmental groups to cease whaling.

44. Int'l Whaling Comm'n Rep., para. 10(e) (Dec. 1988)(schedule).

45. *Id.*

46. *Id.*

47. The Scientific Committee is composed of scientists appointed by member nations.

48. Int'l Whaling Comm'n Rep., para. 30 (Dec.1988) (schedule).

At this time the environmental community and others became concerned that research whaling would be used as a guise for commercial whaling in order to circumvent the moratorium. In response to these concerns, the IWC adopted resolutions in 1986⁴⁹ and 1987⁵⁰ setting out guidelines, recommendations and criteria concerning research whaling and the propriety of allowing research whaling to occur when it does not satisfy the criteria. These resolutions were proposed pursuant to Article VI of the ICRW which provides that the IWC may make recommendations to member nations on any matters which relate to whales or whaling.

This backdrop served as the context within which certification decisions since 1982 have been considered. During this time the United States has made significant decisions concerning certification of Japan, U.S.S.R., Norway, Republic of Korea and Iceland.⁵¹ These certification decisions, which were all highly scrutinized by the environmental community, collectively reflect the present status of the Pelly and Packwood-Magnuson Amendments.

1. Japan

Japan presents an interesting case involving certification because the Secretary of Commerce considered certifying Japan, but did not, in 1984 for commercial whaling operations. The Secretary certified Japan in 1987 for its scientific research whaling program. Moreover, the 1984 decision not to certify Japan resulted in U.S. Supreme Court review in the case of *Japan Whaling Ass'n v. American Cetacean Society*,⁵² which established an important precedent concerning the discretionary latitude of the Sec-

49. The resolution included guidelines urging nations to structure the research so that it would limit the need for lethal research and contribute to regional management of stocks and facilitate the conduct of the comprehensive assessment. In addition, the resolution recommended that whale meat and other whale products obtained through research projects should be utilized primarily for local consumption.

50. The United States led the successful efforts to win adoption of this resolution. The resolution requests that the Scientific Committee review all research programs and report its views as to whether the programs satisfy the criteria in the 1986 resolution and additional criteria relating to whether the research addresses questions that should be answered to conduct the comprehensive assessment or other critical research needs. The research can be conducted without adversely affecting the overall status and trends of stocks in question. It also addresses questions that cannot be answered by existing data or non-lethal research and the research is likely to yield reliable answers to questions being addressed. The resolution also calls on the IWC to notify a nation if a proposed program does not to meet the applicable criteria beginning with the 40th IWC meeting in 1989, and recommends that nations refrain from issuing permits that the IWC considers do not satisfy the applicable criteria.

51. Chile was also considered for certification during this time period. Chile objected to the IWC's 1982 zero quota for the Eastern South Pacific stock of Bryde's whales for the 1983 season. The United States agreed not to certify Chile on its assurances that it would allow only modest whaling in 1983 as a transition to implementing a moratorium thereafter.

52. *Japan Whaling Ass'n v. American Cetacean Soc.*, 478 U.S. 221, 105 C. St. 2860 (1986).

retary of Commerce in deciding whether to certify a nation under the Pelly and Packwood-Magnuson Amendments.

a. 1984 Decision and Japanese Whaling Ass'n

In 1982, the IWC effectively established a zero harvest quota for a stock of sperm whales fished by the Japanese for the 1983/84 pelagic season.⁵³ The IWC, also established in 1982 its moratorium on all commercial whaling to begin in 1985/86 pelagic season.⁵⁴ Japan filed a timely objection to the moratorium and the sperm whale quota.⁵⁵

As the 1984-1985 whaling season approached, it became apparent that if Japan allowed its national to harvest sperm whales for the next season it would be exceeding the reinstated zero quota for sperm whales. The United States informed Japan that the taking of sperm whales in 1984 could result in certification under the Pelly and Packwood-Magnuson Amendments. Japan and the United States then entered into extensive negotiations that culminated on November 13, 1984 in an executive agreement. It was evidenced by an exchange of letters between the Charge d' Affaires of the Japanese Embassy and the Secretary of Commerce. According to the terms of the agreement, Japan agreed to withdraw its objections to the moratorium⁵⁶ and the sperm whale quota,⁵⁷ to adhere to certain harvest limits of sperm and other whales in 1984-1987⁵⁸ and to cease all commercial whaling by 1988. In return, the Secretary of Commerce determined that Japan's whaling activities, as stipulated in the executive agreement, would not diminish the effectiveness of the ICRW or its conservation program and therefore, the Secretary would not certify Japan under either amendment so long as Japan abided by its commitments.

Before the executive agreement was finalized, several wildlife conservation groups, led by the American Cetacean Society, filed suit in U.S. District Court for the District of Columbia seeking, among other things,⁵⁹ a writ of mandamus compelling the Secretary of Commerce to certify Japan. The district court granted summary judgment on grounds that any taking of whales in violation of IWC quotas diminishes the effectiveness of the ICRW and the court ordered the Secretary immediately to certify

53. Int'l Whaling Comm'n Rep. IWC Report, 1982-83, RIWC 34:5 (1984).

54. Int'l Whaling Comm'n Rep., para. 10(e) (Dec. 1988) (schedule).

55. *Id.*

56. This was to be done by April 1, 1985 *effective on* April 1, 1988.

57. This was to be done by December 13, 1984 *effective on* April 1, 1988.

58. The agreement stipulated that 400 sperm whales could be harvested in 1984 and 1985 and that 200 sperm whales could be taken in 1986 and 1987 without triggering certification. In addition, other species of whale could be taken, after consultation with the United States, through the 1986-1987 pelagic whaling season and the 1987 coastal whaling season.

59. Plaintiffs also were requesting (1) a declaratory judgment that the Secretary's failure to certify violated both the Pelly Amendment and the Packwood-Magnuson Amendment; and (2) a permanent injunction prohibiting any executive agreement which would violate the certification and sanction requirements of the two amendments.

to the President that Japan was in violation of the sperm whale quota.⁶⁰ After this judgment, Japan informed the Secretary of Commerce that it would withdraw its objection to the whaling moratorium, as promised in the executive agreement, only if the United States obtained reversal of the district court's order.⁶¹

The U.S. Court of Appeals for the District of Columbia affirmed, 2-1, the district court order holding that the taking by Japanese national of whales in excess of IWC quotas automatically called for certification.⁶²

The U.S. Supreme Court, in *Japanese Whaling Ass'n*, reversed the appellate court in a 5-4 decision written by Justice White. The major issue addressed by the Court was whether the Secretary of Commerce was mandated by either the Pelly or Packwood-Magnuson Amendments to certify Japan because its nationals were exceeding ICRW quotas.⁶³ The Court held that neither the language nor the legislative history of these amendments require the Secretary to certify a nation merely because its nationals are violating a ICRW quota. The Court found reasonable the Secretary's construction of the Pelly and Packwood-Magnuson Amendments that there are circumstances in which certification may be withheld despite departures from the schedules of the ICRW.⁶⁴ In this regard, the Court held that the Secretary could reasonably conclude that " 'a cessation of all Japanese whaling activities would contribute more to the effectiveness of the IWC and its conservation program than any other single development.' " ⁶⁵

In further support of its decision, the Court cited legislative history regarding the Pelly Amendment, the Packwood-Magnuson Amendment and the 1978 amendment to the Pelly Amendment. The 1978 amendment established a certification process for the trade or the taking of wildlife products in violation of a conservation program for endangered or threatened species.⁶⁶ In the House Committee Report of the 1978 amendment to the Pelly Amendment, the Court found that Congress intended there to be a range of discretion in determining what diminishes the effectiveness of an international conservation program.⁶⁷ The Court also

60. *American Cetacean Society v. Baldrige* [sic], 604 F. Supp. 1398, 1411 (D.D.C. 1985).

61. *Japan Whaling Ass'n*, 106 S.Ct. at 2865.

62. *American Cetacean Society v. Baldrige*, 768 F.2d 426 (D.C. Cir. 1985).

63. *Japanese Whaling Ass'n*, 106 S.Ct. at 2867. The Court also briefly considered and rejected petitioner *Japanese Whaling Ass'n's* contention that the present actions were unsuitable for judicial review because they involved foreign relations and a federal court lacked judicial power to order the Executive Branch to dishonor and repudiate an international agreement. *Id.* at 2865-2866.

64. *Japanese Whaling Ass'n*, 106 S. Ct. at 2867.

65. *Id.* at 2872 (quoting from Affidavit of Secretary of Commerce Malcolm Baldrige, Brief for Petitioners in No. 85-955, Addendum III, pp. 6A-7A).

66. *Id.* at 2868-2870.

67. *Id.* at 2869-2870 (quoting H.R. Rep. No. 95-1029 at 15, 1978 U.S. CODE CONG. & ADMIN. NEWS 1779).

noted the House Committee Report's endorsement of the Secretary's decisions not to certify Peru and Korea in 1978 despite their violations of IWC quotas as additional evidence of Congressional intent not to establish a per se rule of certification.⁶⁸

Although holding that the Secretary has discretion in deciding when to certify, the Court recognized such discretion is not unlimited and that the Secretary could probably not refuse certification for reasons not connected with the aims of the conservation goals of the IWC or when member nations are deliberately flouting Schedules without objecting to them.⁶⁹ Nevertheless, this decision establishes that the Secretary has considerable latitude to withhold certification as an enticement to effect results favorable to the conservation objectives of the IWC.

b. 1988 Certification

Since the Supreme Court decision, Japan, in the opinion of the Secretary of Commerce, has abided by the executive agreement regarding commercial whaling.⁷⁰ Japan was certified, however, in 1988, for conducting a research whaling program as discussed below.

For the 1987 IWC annual meeting, Japan submitted to the IWC Scientific Committee a scientific research whaling program focusing on Southern Hemisphere minke whales.⁷¹ The proposal stated that approximately 825 minke whales and 50 sperm whales would be lethally taken in late 1987 and early 1988. Some members of the Scientific Committee found uncertainties with the proposed program which were included in a report submitted to the IWC.⁷² Based on the Scientific Committee's re-

68. *Id.* at 2870, n.7.

69. *Id.* at 2868.

70. On September 23, 1987, the original plaintiffs in this case attempted to reopen the case by filing a motion for relief from judgment pursuant to Federal Rules of Civil Procedure 60(b) in district court. Rule 60(b) provides for relief from judgment in instances such as newly discovered evidence and fraud. Plaintiffs claimed, in essence, that the executive agreement on which the Secretary of Commerce relied in not certifying Japan was invalid because Japan misrepresented its intentions to stop commercial whaling. This misrepresentation was evidenced, according to plaintiffs, in Japan's stated intent in 1987 to engage in scientific whaling which plaintiff's contended was only a sham for commercial whaling. The plaintiffs further argued that since the executive agreement was invalid, the Supreme Court's decision should be reconsidered because it was based on the validity of the executive agreement. The district court denied plaintiffs motion, holding that plaintiffs contentions were speculative since Japan had not yet stated scientific whaling and, in any event, the Supreme Court decision did not hinge upon the Japan's representations regarding the executive agreement but rather upon whether the Secretary of Commerce had discretion to consider alternatives to certification to achieve compliance with the ICRW. *American Cetacean Society v. Bruce Smart*, No. 84-3414 (D.D.C. November 18, 1987).

71. *Int'l Whaling Comm'n Rep.*, 39th Mtg. (1987). *See also* *Int'l Whaling Comm'n Rep., Report of the Scientific Committee*, 39th Mtg. at 48-53 (1987). The program was designed to obtain estimates of the biological parameters required for stock management, principally age-specific natural mortality rates and to obtain estimates of various reproductive parameters.

72. *See supra* note 71.

port, the IWC adopted a non-binding resolution⁷³ stating the view that Japan's research proposal did not satisfy applicable criteria suggested in the 1986 resolution concerning scientific research whaling. The resolution also recommended that Japan not issue the special permit for the program until the serious uncertainties in the program identified by the Scientific Committee have been resolved to the satisfaction of that Committee. However, since the resolution was non-binding, Japan was not obligated under the ICRW to follow the recommendations.⁷⁴

After the conclusion of the 1987 IWC annual meeting, Japan submitted a revised research program to the IWC, which most notably reduced the number of lethal takes of minke whales to approximately 300.⁷⁵ In December, 1987, the Scientific Committee held a special meeting to review the revised program. The report of the Committee reveals that Japan had not resolved all of the original uncertainties to the satisfaction of the entire Committee.⁷⁶ The United Kingdom then introduced a resolution again recommending that Japan not conduct research until the uncertainties had been resolved. This non-binding resolution, which the United States supported, was passed by postal vote on February 14, 1988.⁷⁷

Before the conclusion of the postal vote, Japan issued a special permit to conduct research whaling and Japanese nationals took their first whales under the permit in late January, 1988. Based on these circumstances, the Secretary of Commerce, on February 9, 1988, certified to the President under the Pelly and Packwood-Magnuson Amendments, that nationals of Japan were conducting whaling operations that diminished the effectiveness of the IWC conservation program. In certifying Japan, the Secretary specifically considered the fact that Japan's actions came on the heels of pertinent resolutions. It also considered actions taken by the IWC including the 1987 general resolution establishing guidelines for approving scientific programs, the specific resolution recommending that Japan not issue the permit and the Scientific Committee's generally unfavorable review of the revised program.

As a result of the certification under the Packwood-Magnuson Amendment, Japan was automatically subject to at least a 50% reduction in directed fishing allocations. Consistent with the decision of the President in his report to Congress on April 6, 1988,⁷⁸ required by the Pelly Amendment, the Secretary of State withheld 100 per cent of Japan's rec-

73. Int'l Whaling Comm'n 39th Mtg., para. 45 (1987). This type of resolution is not considered a regulation or amendment to the ICRW Schedule and therefore was non-binding as to Japan whether or not Japan voted against or objected to it.

74. *Id.*

75. Int'l Whaling Comm'n 39th Mtg. (1987).

76. See Circular Communication to Commissioners and Contracting Governments from the Secretary to the Commission, RG/VHJ/16800 (Dec. 22, 1988).

77. See *id.*

78. Letter from President Ronald Reagan to Congress (April 6, 1988).

ommended fishing allocations⁷⁹ and committed to withholding any future allocations so long as the reasons that gave rise to the certification prevailed.

The President decided to withhold imposition of trade restrictions under the Pelly Amendment, however. The President based this decision on his view that the "immediate and prospective effects of a 100 percent reduction of fishing allocations, coupled with Presidential review in the near future, is the most effective means of encouraging Japan to embrace the IWC conservation program."⁸⁰ The President then directed the Secretary of Commerce in cooperation with the Secretary of State to monitor the situation and report back to him no later than December 1, 1988 if further action was needed.

The Secretary of Commerce reported on December 1, 1988, to the President that there had been no significant change in the circumstances that led to the certification.⁸¹ The Secretary added that he would be sending recommendations as to additional steps that could be taken to encourage Japan to embrace the IWC conservation program.

2. U.S.S.R.

The certification of the U.S.S.R. is noteworthy because it is one of only two countries that have been sanctioned under the Packwood-Magnuson Amendment; and it is the only country for which a certification has been terminated pursuant to Pelly Amendment provisions.

The U.S.S.R. originally objected to the IWC 1982 decision to establish a moratorium on commercial whaling to begin in the 1985-86 whaling season and to a specific quota on the take of Southern Hemisphere minke whales for the 1984-85 season.⁸² On April 1, 1985, the Secretary of Commerce certified the U.S.S.R. under the Pelly and Packwood Magnuson Amendments citing the following reasons: The Soviet harvest of Southern Hemisphere minke whales was greater than the level the United States considered to be the Soviet's share; the 1984-85 IWC quota for these whales was exceeded due to the Soviet harvest; and, there had been no indication that the U.S.S.R. intended to comply with IWC standards, including the commercial whaling moratorium.⁸³

Effective April 1, 1985, Soviet-directed fishing allocations were reduced by the 50 percent minimum required under the Packwood-Magnuson Amendment. A complete prohibition on fishing allocations to

79. At the time, Japan had requested 3,000 metric tons of sea snails and 5,000 metric tons of Pacific whiting,

80. *Supra* note 78.

81. Letter from Secretary of Commerce C. William Verity to President Ronald Reagan (Dec. 1, 1988).

82. Int'l Whaling Comm'n Rep., para. 10(e)(Dec. 1988) (schedule); Int'l Whaling Comm'n Rep., *Chairman's Report of the 35th Annual Meeting* (1985).

83. Letter from Secretary of Commerce Malcolm Baldrige to President Ronald Reagan (April 1, 1985).

the U.S.S.R. became effective on April 1, 1986 as required under the Packwood-Magnuson Amendment because the U.S.S.R. had not corrected the situation leading to the certification.

No Pelly Amendment sanctions were imposed at the discretion of the President as expressed in his report to Congress on May 31, 1984.⁸⁴ In recommending no Pelly sanctions, the President stated that trade sanctions against Soviet fish products would not aid other efforts to change Soviet whaling policy. The President reasoned that a trade embargo would have little effect because most Soviet fish products being imported were highly marketable elsewhere. He also indicated that U.S. fishing interest could be seriously harmed because an embargo could lead to the dissolution of U.S.-U.S.S.R. joint ventures. The President further pointed out that the United States was encouraging Japan to stop buying whale meat from the U.S.S.R..

On April 14, 1988, the Secretary of Commerce terminated the certification of the U.S.S.R. pursuant to the Pelly Amendment.⁸⁵ This termination came about after a series of discussions and letters between the two countries following the U.S.S.R.'s announcement that it had ceased all commercial whaling in the Spring of 1987. After receiving assurances from the U.S.S.R. that it would not resume commercial whaling until such whaling can be conducted without jeopardizing the well-being of whale populations; and that the U.S.S.R. will work through the IWC for research and whale conservation, the Secretary of Commerce concluded that the reasons leading to certification no longer prevailed and, therefore, termination of the certification was appropriate under the Pelly Amendment.

3. Norway

Norway was certified in 1986 under the Pelly Amendment for commercial whaling activities and considered for an additional certification in 1988 for its whale research program. The U.S. decision not to certify Norway for its whale research program is of particular interest as it compares to the decision to certify Japan for its research program.

a. 1986 Certification

The 1986 certification of Norway arose out of Norway's taking of minke whales from the northeastern and central stocks in the north Atlantic for which the IWC had established zero quotas by virtue of the moratorium. Norway had timely objected to the moratorium, thereby exempting itself from any treaty obligations to abide by it.⁸⁶

84. Letter from President Ronald Reagan to Congress (May 31, 1985).

85. Letter from Secretary of Commerce C. William Verity to President Ronald Reagan (April 14, 1988).

86. ICRW, Schedule, Para. 10(e)(Dec. 1988). In 1982, the United States entered into discussions with Norway searching for a means by which Norway could withdraw its objec-

In 1986, Norway informed the United States that it had unilaterally authorized domestic quotas for 350 northeastern Atlantic stock and 50 central Atlantic stock minke whales. Shortly thereafter, the United States learned that Norway had begun whaling pursuant to these quotas.

On June 9, 1987, the Secretary certified Norway under the Pelly Amendment stating that the IWC zero quota for two stocks of minke whales in the north Atlantic had been exceeded as a result of the harvest of Norway.⁸⁷ The Packwood-Magnuson Amendment was not at issue because Norway was not eligible for fish allocations in U.S. waters under the Magnuson Act.

On July 3, 1986, Norway announced that it would suspend commercial whaling after the 1987 coastal whaling season and would reduce the domestic quota for 1987 to a number less than the 1986 quota of 400. But it did not withdraw its objection to the moratorium. On August 4, 1986, the President reported to Congress, as required by the Pelly Amendment, that no trade sanctions would be imposed at that time because the Norwegian announcement on July 3, 1986 contemplated compliance, even though delayed, with the IWC zero quotas and the effectiveness of the IWC depends upon such actions of voluntary compliance.⁸⁸ The President stressed that the decision not to impose trade sanctions hinged on Norway's commitment not to resume commercial whaling after the 1987 whaling season. The President further stated that certification of Norway would continue until Norway withdrew its objection to the moratorium or until the IWC authorized a resumption of Norwegian commercial whaling. The President then charged the Secretary of Commerce in consultation with the Secretary of State to monitor Norwegian whaling activities during the period of certification and send additional recommendations as may be warranted.

b. 1988 Consideration of Certification

Since the end of the 1987 whaling season, Norway has not engaged in commercial whaling activities, but it has not withdrawn its objection to the commercial whaling moratorium. It did, however, in 1988, engage in a scientific research program calling for the lethal take of minke whales that resulted in an consideration by the Secretary of Commerce as to the need to certify Norway again.

At the 1988 IWC annual meeting, Norway submitted to the IWC Scientific Committee a proposed research program calling for the lethal take of 30 minke whales and the non-lethal anesthetization of 5 minke

tions to the moratorium so as to avoid certification in the event Norway took whales in contravention to the moratorium or other quotas. These initial discussions were unsuccessful. But until 1986, Norway had not conducted whaling operations that violated IWC quotas and consequently no certification decisions were necessary.

87. Letter from Secretary of Commerce Malcolm Baldrige to President Ronald Reagan (June 9, 1987).

88. Letter from President Reagan to Congress (Aug. 4, 1986).

whales.⁸⁹ After reviewing the program, the IWC Scientific Committee submitted its report⁹⁰ to the IWC which adopted a non-binding resolution⁹¹ stating that the research program did not satisfy the criteria specified in the 1986 resolution on special permits for scientific research and the 1987 resolution on scientific research programs. The resolution concluded that the research would not contribute information to rationally manage the stock, would not facilitate the 1990 comprehensive assessment, and did not address critically important research needs. The resolution did not explicitly recommend that the research not take place, but did incorporate by reference its 1987 resolution.

Following the 1988 IWC meeting, Norway announced that it would take into account the comments of the IWC Scientific Committee concerning its research program and would proceed to take 35 whales for research purposes. The United States responded with an expression of concern based on the possible need to examine Pelly Amendment obligations given Norway's apparent intent to engage in a scientific research program that was not endorsed by the IWC. As a result, the United States and Norway entered into bilateral discussions of Norway's research program.

During the discussions U.S. and Norwegian officials addressed Norway's research program and how it might be better defined and clarified so as to respond to IWC concerns. U.S. obligations under the Pelly Amendment were also discussed. Extensive documentation of the Norwegian whale research program not presented to the IWC Scientific Committee was received and reviewed by U.S. officials and scientists. Based on these discussions and review of Norwegian documentation of the research program, U.S. scientists concluded that the research program appeared to be a sound approach to Norwegian objectives of studying the ecosystem in which the minke whales resided.

Following these discussions the Secretary of Commerce, on August 31, 1988, reported to the President that the taking of whales in conjunction with the Norwegian research program did not diminish the effectiveness of the IWC conservation program and therefore another certification was not warranted.⁹² The Secretary of Commerce further reported that trade sanctions pursuant to the 1986 certification were unwarranted. In reaching these conclusions, the Secretary cited the bilateral discussions and the conclusions of U.S. scientists, concerning the clarified Norwegian research program. In addition, the Secretary stated that the IWC Scientific Committee noted that the proposed take of minke whales would have only a negligible impact on the stock, and therefore, would not cause a significant impact on the environment. The Secretary further concluded

89. Int'l Whaling Comm'n Rep., *Report of the Scientific Committee*, 40th Mtg. (1988).

90. *Id.*

91. Int'l Whaling Comm'n Rep., 40th Mtg., para. 33 (1988). *See also, supra* note 73.

92. Letter from Secretary of Commerce C. William Verity to President Ronald Reagan (Aug. 31, 1988).

that it was vital to keep fully involved in the IWC process those countries that have a tradition of or a future interest in whaling.

4. Republic of Korea

In 1986, the Republic of Korea (Korea) along with Iceland became the first countries to be considered for certification for the taking of whales for purposes of scientific research. Korea submitted to the Scientific Committee at the 1985 IWC annual meeting its proposal to kill 200 minke whales for purposes of scientific research in 1986.⁹³ The Scientific Committee found that the proposed research program did not comply with request for information requirements found in Paragraph 30 of the IWC Schedule.⁹⁴ The IWC, however, took no formal action in 1985 regarding Korea's research proposal.

After the 1985 IWC meeting, the United States requested Korea to refrain from research whaling until after the 1986 IWC meeting in order to allow Korea to submit a revised research proposal to the Scientific Committee for another review. Korea submitted a revised research program that called for the killing of 160 minke whales to the 1986 IWC Scientific Committee meeting.⁹⁵ The Scientific Committee again concluded that the proposal did not comply with Paragraph 30 of the IWC Schedule because no detailed research program had been presented for review.⁹⁶ Again, the IWC took no formal action against Korea regarding its scientific research proposal.

After the 1986 IWC meeting, Korea began taking whales pursuant to the research proposal. Upon learning this, the U.S. government conveyed to Korea its concern about Korea's decision to proceed without having provided adequate information to the Scientific Committee for review. The United States also expressed concern that Korea was taking whales from a protection stock of minke whales and was using cold grenade harpoons which were banned by the IWC in 1983. Following discussions with Korean officials, during which the possibility of certification under the Pelly and Packwood-Magnuson Amendments was raised, Korea decided to suspend any further taking of whales for scientific research until the end of the 1987 IWC annual meeting.

Korea submitted another revised research proposal at the 1987 IWC annual meeting.⁹⁷ This time the proposal was reviewed by the Scientific Committee which expressed serious uncertainties about the research pro-

93. Int'l Whaling Comm'n Rep., 37th Mtg. (1985); Int'l Whaling Comm'n Rep., *Report of the Scientific Committee*, 36th Mtg. (1986).

94. Int'l Whaling Comm'n Rep., 37th Mtg., para. 4 (1985) See *Report of the Scientific Committee*, 1985, RIWC 36:30-55 (1986).

95. Int'l Whaling Comm'n Rep., 38th Mtg., para. 21 (1986) See *Report of the Scientific Committee*, 1986, RIWC 37:28-60 (1987).

96. *Id.*

97. Int'l Whaling Comm'n Rep., 39th Mtg., para. 5 (1987).

gram in its report to the IWC.⁹⁸ After considering the Scientific Committee Report, the IWC adopted a non-binding resolution stating that the proposed take of whales pursuant to the research program "did not satisfy the criteria set forth in the 1986 Resolution on Special Permits for Scientific Research in that it has not contributed information which will answer any significant management questions and the proposed take will not materially facilitate the conduct of the Comprehensive Assessment."⁹⁹ Following the conclusion of the 1987 IWC meeting, Korea announced that it would not take any whales pursuant to its research program.

5. Iceland

At the 1985 IWC annual meeting, Iceland presented a four year research program which called for the lethal take of fin, sei and minke whales.¹⁰⁰ The original proposal called for catches of 80 fin, 40 sei and 80 minke whales for each of the 1986-1989 seasons, although Iceland has modified its research program in each year since 1986.¹⁰¹

The Secretary of Commerce has considered possible certification of Iceland for conducting its research program in 1986, 1987 and 1988. The United States, however, has refrained from certifying Iceland in all cases as discussed below.

a. 1986 Research Program

The Scientific Committee reviewed Iceland's original research proposal in 1985 and the 1986 component again in 1986.¹⁰² Uncertainties about the research program were expressed by some members of the Scientific Committee.¹⁰³ The IWC, however, took no action regarding the Icelandic program although, it did adopt the 1986 resolution establishing criteria for scientific research permits.¹⁰⁴

Following the 1986 meeting, Iceland began its research program. Shortly thereafter, the United States became concerned about Iceland's commitment to adhere to one of the recommendations in the 1986 resolution on scientific research permits regarding local consumption of whale meat and products taken pursuant to the research permit. That recommendation states that whale "meat as well as other products should be

98. Int'l Whaling Comm'n Rep., 39th Mtg., para. 4 (1987).

99. Int'l Whaling Comm'n Rep., 39th Mtg., para. 44 (1987).

100. Int'l Whaling Comm'n Rep., 37th Mtg., para. 20 (1985); *See Report of Scientific Committee*, 1985, RIWC 36:31-32 (1986).

101. Most notably, Iceland has declined to take any minke whales for all three years.

102. *See Report of the Scientific Committee*, 1985, RIWC 36:31-32 (1986); and *Report of the Scientific Committee*, 1986, RIWC 37:28 (1987).

103. *Id.*

104. The 1986 resolution on scientific research permits, as contrasted with the 1987 resolution, did not recommend that the IWC should formally comment on the program or the Scientific Committee's review of the program.

utilized primarily for local consumption."¹⁰⁵ As a result, the United States and Iceland entered into discussions about the proper interpretation and adherence to that recommendation.

Iceland indicated that it interpreted the recommendation to mean that a country conducting scientific whaling should consume domestically a large percentage of the total weight of all whale products generated by the research. Thus, Iceland felt justified in exporting 90% of the whale meat produced by research. United States officials considered whether this interpretation, if carried out, would justify certification under the Pelly Amendment¹⁰⁶ on grounds that exporting more than 50 percent of the whale meat as well as other whale products violated the consensus interpretation of the recommendation concerning local consumption. The United States communicated these concerns to Iceland. Iceland, finally agreed not to export more than 49% of whale meat as well as other whale products produced by research whaling. Based on this assurance, the Secretary of Commerce decided not to certify Iceland under the Pelly Amendment. Iceland ended up taking 76 fin and 40 sei whales during its 1986 research program.¹⁰⁷

b. 1987 Research Program

Iceland renewed its intent to conduct its 1987 research whaling program at the 1987 Scientific Committee meeting and submitted a progress report for the 1986 research.¹⁰⁸ Again, certain members of the Scientific Committee expressed uncertainties about the program which were included in the report submitted to the main body of the IWC.¹⁰⁹ That same year, as discussed above, the IWC adopted a resolution adding criteria for the review of scientific research programs and calling for the countries whose research programs are found not to meet applicable criteria to refrain from issuing scientific research permits.¹¹⁰

After considering the Scientific Committee report, the IWC adopted a non-binding resolution¹¹¹ stating that the Icelandic research program did not fully meet the criteria of the 1986 resolution concerning scientific research permits. The resolution further recommended that Iceland revoke and refrain from issuing special permits to its nationals for scientific research until uncertainties identified in the Scientific Committee Report

105. Int'l Whaling Comm'n Rep., 38th Mtg., para. 28 (1986).

106. Although Iceland was a party to a governing international fishery agreement with the United States, thereby making it eligible for fishing allocations under the Magnuson Act, it had not received any allocations. Accordingly, the Packwood-Magnuson Amendment certification was not at issue.

107. See Int'l Whaling Comm'n Rep., 37th Mtg. (1987).

108. *Id.*; see also Int'l Whaling Comm'n Rep., para. 13, 16 (1987).

109. *Report of the Scientific Committee*, Int'l Whaling Comm'n Rep., 39th Mtg., para. 4 (1987).

110. See *supra* note 50.

111. International Whaling Comm'n Rep., 39th Mtg. (1987). See *supra* note 73.

have been resolved to the satisfaction of the Scientific Committee.

Following the 1987 IWC meeting, Iceland indicated that it fully intended to carry out its research program despite the IWC resolution recommending otherwise. The United States communicated to Iceland that if it did so, the United States would have to consider certification under the Pelly Amendment. Before beginning the research program, Iceland agreed to discuss the matter with U.S. officials.

Officials from both countries met in July and September, 1987 to discuss the research program and possible certification of Iceland. As a result of these discussions, the Secretary of Commerce agreed, in an exchange of letters with Iceland's Charge d'Affaires, not to certify Iceland for its whaling research in 1987; and thereafter, if Iceland limited the taking to 80 fin and 20 sei whales, submitted its future research programs for review by the IWC Scientific Committee and carried out the scientific recommendations of that Committee.¹¹² Iceland completed its research program in 1987 by taking 80 fin and 20 sei whales.¹¹³

c. 1988 Research Program

At the 1988 IWC Scientific Committees meeting, Iceland submitted a revised 1988 scientific research program as well as reports on results of the 1987 program.¹¹⁴ The 1988 program again called for the lethal take of 80 fin and 20 sei whales. After its review, the Scientific Committee forwarded its report,¹¹⁵ which again included uncertainties expressed by some members of the Committee, to the main body of the IWC. The IWC adopted a non-binding resolution,¹¹⁶ by consensus, that stated that Iceland's research program did not satisfy each of the criteria in both the 1986 resolution on special permits for scientific research and the 1987 resolution on scientific programmes.

Shortly after the 1988 IWC meeting representatives of the United

112. The agreement was structured as follows:

1. For 1988, and thereafter, Iceland would submit its research program for review by the Scientific Committee and would carry out the scientific recommendations of that Committee.
2. The United States would not certify Iceland for the 80 fin whales and 20 sei whales taken in 1987, nor for whales taken subsequently in the Icelandic program for scientific research, so long as Iceland complies with the first condition.
3. The United States will work with Iceland and other IWC commissioners to review and make recommendations regarding the structure of the IWC Scientific Committee's process for the review of research permits, so as to build confidence in that process and is scientific basis.

113. *Report of the Scientific Committee*, Int'l Whaling Comm'n Rep., 40th Mtg., para. 4 (1988).

114. *Id.* at 51-62.

115. *Report of the Scientific Committee*, Int'l Whaling Comm'n Rep., 40th Mtg., para. 4 (1988).

116. Int'l Whaling Comm'n Rep., 40th Mtg. (1988). *See supra* note 73.

States and Iceland met to discuss Iceland's research program and the possibility of responding to concerns of the some members of the Scientific Committee and improving the program in light of those concerns. Based on these discussion, Iceland significantly modified and improved its research program and reduced the number of fin whales it planned to take 80 to 68 and the number of sei whales from 20 to 10. Iceland had decided not to take any minke whales. It also indicated its intention to provide information at the 1989 IWC meeting of the Scientific Committee on certain specific issues in order to address the uncertainties about its research program identified by some members of the Committee.

Given these factors the Secretary of Commerce concluded as follows in a letter to attorneys for certain environmental groups who had requested that the Secretary certify Iceland:

In my view the modifications made by Iceland in its research program represent a constructive response to the IWC non-binding resolution. Moreover, it is my judgment that the effectiveness of the IWC conservation program is better served by keeping Iceland fully involved in the IWC process rather than by risking alienation of Iceland by certifying it for continuing its research program in the face of a non-binding resolution of the IWC. I would note, in this regard, that it is far from clear that certifying Iceland now would induce it to eliminate the lethal components of its research whaling program. Alienating Iceland from the IWC, on the other had, would remove the restraining influence exerted by the IWC on Iceland's whaling activities For these reasons, I have determined that Iceland's decision to proceed with its research whaling program, as modified in response to the IWC's non-binding resolution, does not diminish the effectiveness of the International Whaling convention or the IWC's conservation program. Consequently, certification of Iceland under the Pelly Amendment is unwarranted at this time.¹¹⁷

The Secretary of Commerce's decision not to certify Iceland has been challenged by the same environmental groups to whom the Secretary wrote the above comments in the United States District Court for the District of Columbia.¹¹⁸

IV. CONCLUSION

The history of certification decisions and sanctions over the last seventeen years reveals that the Pelly and Packwood-Magnuson Amendments have been used as both sticks and carrots to encourage whaling nations to comply with the ICRW. These decisions, particularly in the last few years, have been measured responses designed to address specific problems without sacrificing overreaching policies and objectives of the

117. Letter from Acting Secretary of Commerce Donna Tuttle to the law firm Arnold & Porter (July 15, 1988).

118. *Greenpeace, U.S.A. et al. v. Robert Mosbacher*, Secretary of Commerce, No. 88-2158 (D.D.C., filed Aug. 3, 1988).

ICRW and its conservation program. In each case of actual or potential certification of countries for whaling practices, the offending country has taken positive steps towards compliance with IWC conservation goals. At this time, all member nations of the IWC are abiding by a complete moratorium on commercial whaling despite objections lodged by the major whaling countries. Those nations that are engaging in scientific research whaling, all of which have been considered for certification or certified based on their research activities, have continued to submit their programs to the IWC Scientific Committee for review and have made modifications in response to uncertainties about the programs raised by members of the Scientific Committee. Moreover these countries all remain involved in the IWC process and subject to its influence. Given the history of certification decisions and the present status of international whaling, the Pelly and Packwood-Magnuson Amendments unquestionably have had a salutary effect on the ability of the IWC to achieve its conservation objectives.

